OCBC Bank (M) Bhd & Anor v Livision Sdn Bhd & Ors

HIGH COURT (KUCHING) — SUIT NO 22–48 OF 1998
ZAKARIA SAM JC
7 DECEMBER 2000

Civil Procedure *— Judgment — Default of appearance — Setting aside — Irregular service of writ — No personal service on guarantor, whether guarantor evading service — Judgment interest excessive and not in accordance with agreement — Delay in making application, whether defeats application — Whether defence on merits — Whether judgment should be set aside*

The plaintiff bank granted loan facilities to the first defendant wherein the second, third and fourth defendants were guarantors. When the first defendant defaulted in payment of monthly instalments, the plaintiff commenced action against all the defendants for the principal sum and interest accrued thereon. The contractual interest was chargeable at 2.25% pa above the base lending rate ('BLR'). There was no provision to fix the interest rate at a fixed rate either upon demand or upon judgment. The plaintiff attempted to serve the writ on all the defendants but was unsuccessful. Subsequently, the plaintiff served the writ on all the defendants at an address given by the second defendant. Judgment in default was entered against the fourth defendant on 8 July 1998 on the principal sum together with interest at the rate of 13.35% pa on monthly rests from 9 February until the date of full and final settlement. The judgment was never served on the fourth defendant. The fourth defendant came to know of the judgment on 6 February 1999. On 8 March 1999, the fourth defendant applied for, inter alia, the purported service of the writ and statement of claim be set aside as it was not regularly obtained and that the judgment in default of appearance be set aside as he was at all material time residing outside the jurisdiction of Malaysia at or after the date of commencement of the action, that he was not evading service and/or alternatively, he had a good defence on the merits. The plaintiff also took out applications to strike out the amended defence and counterclaim of the first defendant (encl 50) and the defence of the second and third defendants (encl 61), which were dismissed by the court. The issues raised by the plaintiff against the fourth defendant's application were: (i) whether the service of the writ was regular; (ii) whether the judgment interest was excessive and not in accordance with the agreement; (iii) whether there was delay by the fourth defendant in making the application; and (iv) whether the fourth defendant had a good defence on the merits.

Held, allowing the fourth defendant's application with costs to be taxed:

(1) Since the fourth defendant was being sued as a guarantor, the writ must be personally served on him. There was no evidence that the

second defendant had represented that he was authorized by the fourth defendant to accept service of the writ on his behalf. Hence, the purported service of the writ on him was irregular and bad in law (see p 135B–C, E). Also, the fourth defendant at all material time was outside the jurisdiction of Malaysia. Hence, he was not evading service (see p 132H).

(2) The judgment in default which was entered against the fourth defendant fixed the interest rate until the date of full settlement contrary to what was contractually agreed upon. Hence, the judgment was not in accordance with the agreement between the parties (see p 135H). Further, the plaintiff has also entered judgment on interest at a rate which far exceeded the rate which the parties had contracted for. The agreement between the parties merely stipulated interest chargeable at 2.25% above the BLR (see pp 135I–136A).

(3) The application by the fourth defendant was filed with reasonable promptitude and was bona fide. The most important consideration in an application to set aside a judgment in default is whether there is a defence on the merits. The question of delay is secondary (see p 138D); *Malayan United Bank v Mohamed Salleh bin Mohamed Yusoff & Ors* [1988] 3 MLJ 165 followed.

(4) It was not disputed that in both the plaintiff's earlier applications (encls 50 and 61) and the present application, the defence involved the same issues. Hence, the court concurred with the earlier findings that there were triable issues (see p 138I).

[Bahasa Malaysia summary

Bank plaintif memberi kemudahan pinjaman kepada defendan pertama di mana defendan kedua, ketiga dan keempat merupakan penggerenti. Apabila defendan pertama mengingkari bayaran ansuran bulanan, plaintif memulakan tindakan menentang semua defendan tersebut bagi jumlah utama dan faedah yang terakru. Faedah kontraktual boleh dicaj pada 2.25% setahun di atas kadar pinjaman asas ('KPA'). Tiada peruntukan dibuat untuk menetapkan kadar faedah pada satu kadar tetap sama ada atas permintaan ataupun setelah penghakiman. Plaintif cuba menyampaikan writ kepada semua defendan tetapi tidak berjaya. Selepas itu, plaintif menyampaikan writ kepada semua defendan di satu alamat yang dibekalkan oleh defendan kedua. Penghakiman ingkar dimasukkan terhadap defendan keempat pada 8 Julai 1998 bagi jumlah utama bersama faedah pada kadar 13.35% setahun dari 9 Februari sehingga tarikh penjelasan penuh dan akhir. Penghakiman itu tidak pernah disampaikan kepada defendan keempat. Defendan keempat hanya mengetahui mengenai penghakiman tersebut pada 6 Februari 1999. Pada 8 Mac 1999,

defendan keempat memohon agar penyampaian writ yang dikatakan dan pernyataan tuntutan tersebut diketepikan kerana ia tidak diperolehi mengikut aturan dan agar penghakiman ingkar kehadiran tersebut diketepikan kerana pada semua waktu material beliau bermastautin di luar bidang kuasa Malaysia semasa atau selepas tarikh permulaan tindakan tersebut, bahawa beliau bukannya mengelak penyampaian dan/atau alternatifnya, beliau mempunyai pembelaan yang baik atas merit. Plaintif juga memohon membatalkan pembelaan berpinda dan tuntutan balas defendan pertama (kandungan 50) dan pembelaan defendan kedua dan ketiga (kandungan 61), yang ditolak oleh mahkamah. Perkara-perkara yang dikemukakan oleh plaintif terhadap permohonan defendan keempat ialah: (i) sama ada penyampaian writ tersebut mengikut aturan; (ii) sama ada faedah penghakiman tersebut keterlaluan dan tidak menuruti perjanjian; (iii) sama ada terdapat kelewatan ketika defendan keempat membuat permohonan; dan (iv) sama ada defendan keempat mempunyai pembelaan yang baik pada merit.

Diputuskan, membenarkan permohonan defendan keempat dengan kos untuk ditetapkan:

(1) Oleh kerana defendan keempat didakwa sebagai penggerenti, writ tersebut mestilah disampaikan kepadanya secara peribadi. Tiada keterangan menunjukkan bahawa defendan kedua telah mewakili atau diberi kuasa oleh defendan keempat untuk menerima penyampaian writ bagi pihaknya. Oleh itu, penyampaian writ yang dikatakan itu adalah luar aturan dan tidak sah di sisi undang-undang (lihat ms 135B–C, E). Selain itu, defendan keempat dalam semua waktu yang material berada di luar bidang kuasa Malaysia. Oleh itu, beliau bukannya mengelak penyampaian (lihat ms 132H).

(2) Penghakiman ingkar tersebut yang dimasukkan menentang defendan keempat menetapkan kadar faedah sehingga tarikh penjelasan penuh, berbeza dengan apa yang dipersetujui secara kontraktual. Oleh itu, penghakiman tersebut tidak menepati perjanjian di antara pihak-pihak tersebut (lihat ms 135H). Lagipun, plaintif juga telah memasukkan penghakiman mengenai faedah pada kadar yang jauh melebihi kadar yang dipersetujui pihak-pihak secara kontrak. Perjanjian di antara pihak-pihak tersebut cuma mensyaratkan faedah dapat dicaj pada 2.25% atas KPA (lihat ms 135I–136A).

(3) Permohonan defendan keempat difailkan dengan kepantasan yang sewajarnya dan bersifat bona fide. Pertimbangan yang paling penting dalam suatu permohonan mengetepikan satu penghakiman ingkar adalah sama ada terdapatnya pembelaan pada merit. Persoalan kelewatan tidak begitu penting (lihat ms 138D); *Malayan United Bank v Mohamed Salleh b Mohamed Yusoff & Ors* [1988] 3 MLJ 165 diikut.

(4) Adalah tidak dipertikaikan bahawa dalam kedua-dua permohonan awal plaintif (kandungan 50 dan 61) dan dalam permohonan semasa ini, pembelaan melibatkan isu-isu yang sama. Oleh itu, mahkamah bersetuju dengan keputusan-keputusan awal bahawa terdapatnya isu-isu yang boleh dibicarakan (lihat ms 138I.]

Notes

For cases on judgment in default of appearance, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2534–2569.

Cases referred to

Armitage v Parsons [1908] 2 KB 410 (refd)
Kenneth Allison Ltd (in liq) & Ors v AE Limehouse & Co (a firm) [1997] 4 All ER 500 (refd)
Khor Ching Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ (refd)
Kong Wing Sum v Public Bank Bhd [2000] 1 MLJ 570 (refd)
Malayan United Bank Bhd v Mohamed Salleh bin Mohamed Yusoff & Ors [1988] 3 MLJ 165 (folld)
Tuan Hj Ahmad Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30 (refd)

Legislation referred to

Companies Act 1965
Rules of the High Court 1980 O 43 r 13
Rules of the Supreme Court O 10 r 1(1), O 81 r 3(1)(a)

Ann CJ Teo (*Lim & Teo Advocates*) for the plaintiff.
Gabriel Wong En Phin (*Detta Samen & Co Advocates*)

Zakaria Sam JC:

The application

By summons in chambers dated 8 March 1999 (encl 106), the fourth defendant applied, inter alia, for the following orders:

(1) The purported service of writ of summons and statement of claim both dated 17 March 1998 on him be set aside;

(2) That the judgment in default of appearance obtained by the plaintiff against him dated 8 July 1999 be set aside on the grounds that:

(i) he was at all material times residing outside the jurisdiction of Malaysia at or after the date of commencement of this action;

(ii) he was not evading service;

(iii) the purported service of the writ of summons and statement of claim dated 17 March 1998 on him was not regularly obtained;

(iv) the judgment in default of appearance dated 8 July 1998 was irregular; and/or

(v) alternatively, he has a good defence on the merits to the plaintiff's claim.

Facts

The plaintiff company is a bank registered under the Companies Act 1965 with a branch office operating in Kuching at No 35 Leboh Khoo Hun Yeang.

On 12 October 1994 and 25 November 1995, the plaintiff granted a total sum of RM7.2m loan facilities to the first defendant. Out of this RM7.2m, RM4.2mn was for a term loan facility and RM3m for an overdraft facility.

These facilities were for the purpose of part financing the purchase of an eight storey hotel building together with that piece of land, refurbishment of the hotel and working capital for the running of hotel business.

The second, third and fourth defendants were the directors of the first defendant's company and became joint and several guarantors of the said facilities under two letters of guarantee dated 5 December 1995 and 18 December 1995 respectively.

This action was commenced by the plaintiff against the defendants herein claiming the sum of RM4,432,269.03 in respect of the term loan facility, and RM3,337,365.03 in respect of the overdraft facility together with the stipulated interest accruing thereof when the first defendant defaulted in the payment of monthly instalments and was in arrears for six months as at 13 October 1997, and that the first defendant failed to operate the overdraft account satisfactorily and exceeded the overdraft limit to the extent of RM193,152.72 as at 13 October 1997.

The plaintiff claims against second, third and fourth defendants for:

(i) (a) RM4,432,269.03 in respect of term loan facility.

(b) interest thereon at the rate of 13.35% pa on monthly rests from 9 February 1998 until the date of full and final settlement,

(ii) (a) RM3,337,365.03 in respect of the overdraft facility,

(b) interest at the rate of 13.35% pa on monthly rests from 9 February 1998 until the date of full and final settlement.

Judgment in default had been entered against the fourth defendant on 8 July 1998.

It is to be noted that the plaintiff had also taken out two similar applications against the first, second and third defendants. First summons-in chambers (encl 50) was to strike out the amended defence and counterclaim of the first defendant and the other dated 29 August 1998 (encl 61) was to strike out the defence of the second and third defendants. Both applications had been dismissed by Muhammad Kamil J on 24 November 1998.

The service — regular or irregular? A

Wong Lee Kiong (f) in her affidavit in opposition (encl 110) affirmed on 10 November 1999, deposed that several attempts to serve the writ on all the defendants at the address shown on the loan documents, ie at 47 Jalan Tun Ahmad Zaidi Adruce, 93150 Kuching were unsuccessful. However, on 14 April 1998 she managed to contact the second defendant through his B phone and informed him that she intended to serve the writ on them, failing which substituted service in the newspaper was to be effected. Upon hearing this, the second defendant requested the said writ to be sent by post to him and all the other defendants care of the address of his other company, Lakbima (M) Sdn Bhd at No 44 Jalan Radin Tengah, Bandar Baru, Seri Petaling, 57000 Kuala Lumpur. C

On 22 April 1998, the writs were sent to the second, third and fourth defendants individually by AR registered post at the above given address.

The fourth defendant in his affidavit in support of this application (encl 106) deposed that during the years of 1995 to 1997, he had resided in New Zealand and worked as an outdoor educator there. D

He also denied that the signature on the A card was his as the period between 22 April 1998 and 29 September 1998 he was residing in New Zealand for his post graduate studies. As such, he was not the person who signed the AR registered card accompanying the writ. He also had not authorized any person to accept service on his behalf of any documents addressed to him personally. E

The learned counsel for the plaintiff submitted that the service on the fourth defendant was good and cited *Kenneth Allison Ltd (in liq) & Ors v AE Limehouse & Co (a firm)* [1997] 4 All ER 500. In that case, the plaintiff instructed a process server to effect personal service of the writ on the defendants. The process server attended at the defendants' offices, where he F told the senior partner's personal assistant that he wished to serve a writ. She consulted one of the partners and he authorized her to accept the writ. She then told the process server that she had been so authorized and received from him a sealed copy of the writ and a form of acknowledgment of service. The defendants subsequently issued a summons seeking an order setting aside service and a declaration that the writ had not been duly served G because it had not been served on the firm, pursuant to O 81 r 3(1)(a) RSC which provides that where partners are sued in the name of a firm the writ may be served on any one or more of the partners. Furthermore, it was argued that no personal service of the writ was effected on the partner as required by O 10 r 1(1), which provides that a writ must be served H personally on the plaintiff or his agent.

The House of Lords held that:

> However, service of the writ on the defendants had been effective since service under an ad hoc agreement made in relation to contemplated proceedings, by which one party, knowing that the other party wished to serve process upon I him, requested or authorized the other to do so in a particular way which was outside the rules and the other did so, was valid and legally effective as there was nothing in the rules of court restricting consensual service of the writ to

A the manner specified in O 10 r 3, namely an agreement as to service embodied in a wider contract. Accordingly, the plaintiffs were entitled to rely on the ad hoc agreement whereby the partner expressly authorized acceptance of service, which acceptance was communicated to and acted upon by the process server when he handed over the writ.

B I fully subscribed to the above judgment.

But the facts in the instant application are different. In this application, the fourth defendant is being sued as a guarantor, therefore, the writ must be personally served on him (as opposed to the defendants in *Kenneth Allison's* case who were partners — any one of them could accept service on behalf of the firm). In her affidavit, Wong Lee Kiong clearly stated that it C was the second defendant who instructed her to send all the writs to him. No where was it stated that the second defendant had represented to her that he was authorized by the fourth defendant to accept service of the writ on his behalf, or that the fourth defendant had authorized the second defendant to accept the service on his behalf. The fact that the second defendant is the fourth defendant's father and also a director of the first D defendant is immaterial.

From the copy of the international passport exhibited in his affidavit, I have no doubt that in the years of 1995 to 1997 and on 22 April 1998 (the date when the writ was purportedly served on him) to 29 September 1998, the defendant was in New Zealand. This eliminates any notion that he was E evading service.

The defendant had conclusively rebutted the evidence that the writ had been served on him. Therefore the purported service of the writ on him is irregular and bad in law.

F *Was the judgment interest excessive and not in accordance with the agreement?*

Schedule 11 — A (a) of the facility agreement dated 27 December 1994 stipulates that 'the borrower shall pay interest on all amounts outstanding from time to time under the overdraft facility at the rate of two point two five per centum per annum (2.25% pa) above the lender's base lending rate from time to time with monthly rest on a daily basis'.

G

Similarly Schedule 1 of the term loan agreement dated 27 December, 1994 stipulates interest at the rate of 'two point two five per centum (2.25% pa) above the lender's base lending rate.

In short, the contractual interest is chargeable at a fluctuating rate based on the variation from time to time in the base lending rate. There is H no provision to fix the interest at a fixed rate either upon demand or upon judgment.

Judgment, on the other hand, was entered at 'the rate of 13.35% pa on monthly rests from 9 February until the date of full and final settlement' which thereby fixed the interest rate until the date of full settlement contrary I to what was contractually agreed upon.

Clearly, the plaintiff had entered judgment on interest at a rate which far exceeded the rate which the parties had contracted for. The letters of

offer dated 12 October 1994 and 25 November 1995 merely stipulate interest chargeable at 2.25% above bank's base lending rate per annum for both the term loan and overdraft facilities.

The learned counsel for the fourth defendant submitted if one is to take the plaintiff's base lending rate today at 7.25% pa and add 2.25% (the margin) to the same, the contractual interest to which the plaintiff would be entitled to charge is only 9.5%, resulting in an excess or difference of 3.85% pa. The excess interest 3.85% pa on the alleged outstanding sums under the term loan and overdraft facilities of RM4,432,269.03 and RM3,337,365.03 would have been very substantial, approximately an excess sum of RM296,000 pa or RM24,000 per month.

The learned counsel for the plaintiff in her reply submitted that if this court is of the view that this judgment in default is regular, but the fourth defendant has not raised triable issues (save the issue of fluctuating interest rates), this court should vary the judgment instead of setting it aside, so as to provide the fluctuating interest rates before and after the judgment.

This is tantamount to admitting the issue raised by the fourth defendant. However, is it possible for this court to just amend the interest rate?

In *Armitage v Parsons* [1908] 2 KB 410, the plaintiff had obtained judgment in default of appearance as a result of an error of the judgment which included a sum by way of costs which exceeded by 12s, the amount properly allowable. It was held by the Court of Appeal that (at p 415):

> In my opinion, Order XXVIII r 11 [in pari materia with O 20 r 11 of the Rules of the High Court 1980], which provides that 'clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a judge on motion or summons without an appeal', enables us to deal with this case so as to do substantial justice.

And later at p 417:

> To my mind it is clear, as a matter of good sense and justice, that this was an accidental slip which under Order XXVIII r 11, ought to be corrected, and that the whole judgment should not be set aside because of a mistake to the insignificant amount of 12s. I do not think that by so amending the judgment any of the rules or any principle of law is infringed.

What constitutes clerical mistakes and accidental slips or omissions was elaborated by Zakaria Yatim J (as he then was) in *Malayan United Bank Bhd v Mohammed Salleh bin Mohamemd Yusoff & Ors* [1988] 3 MLJ 165:

> In my opinion, if the figure had been entered by mistake or if the solicitor's clerk had inadvertently filled the wrong figure and the error had not been discovered, then there was clearly an accidental slip which should be corrected. Where there was such a mistake and the amount involved was insignificantly small, the mistake could be corrected and the judgment in default should not be set aside (see *Armitage v Parsons* [1908] 2 KB 410).

In the above case, the respondent had entered judgment in default of appearance against the applicant with interest rate from date of judgment to date of realization far in excess of the statutory rate of 8% pa.

Having considered the facts of the case, His Lordship ruled:

> In the instant case I do not think there was a mistake or accidental slip in putting the rate of interest at the rate of 17.75% pa. It was stated in the statement of claim; it was stated in the judgment in default and indeed Mr Chandran strenuously argued before me to justify that the respondent was entitled to that rate of interest. The respondent in fact deliberately included interest at the rate of 17.75% from the date of judgment to date of realization. If this rate of interest is calculated on the basis of the principal sum of $3,000,000 the amount would be significantly large. The principle in *Armitage v Parsons* does not apply in the present case and there is no question of the court varying the rate of interest at this stage.

The learned counsel for plaintiff then cited *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223, wherein Gopal Sri Ram JCA held:

> For the purpose of this appeal, I shall assume, without deciding, in the fourth defendant's favour, that the default judgment was entered for too much because the interest rate there stipulated was greater than that permitted by law. It is still a matter that may be cured by amendment without any resultant prejudice to anyone. The plaintiff had applied to just that. It was that application which alerted the fourth defendant, and he moved to set aside the whole of the judgment.

It is pertinent to note that the plaintiff in the abovesaid case took upon itself to apply to amend the judgment, and this alerted the defendant to take out an application to set aside the judgment.

In the present case the plaintiff too had taken out a summons to amend the award of interest, but for reasons best known to them, they withdrew the said application.

In conclusion, I would sum up that there is no contractual basis upon which the rate of 13.5% pa is charged. It is not a case of merely failing to comply with the rules of procedure, but a case of entering judgment for which the plaintiff was not contractually entitled to do so, thereby affecting the fourth defendant's substantive right not to be liable for more than what had been contractually agreed upon.

Since the plaintiff had entered judgment with the rate of interest far in excess of the contracted rate, the fourth defendant has a right *ex debito justitiae* to have the judgment set aside.

Delay in making this application

The learned counsel for the plaintiff submitted that there has been an unreasonable delay in making this application to set aside the writ and judgment, and there is no explanation in the fourth defendant's affidavit as to the reason for the delay.

It is not disputed that the said judgment in default of appearance was never served on the fourth defendant. Therefore, O 42 r 13 of the Rules of the High Court 1980 does not apply here.

It was held in *Tuan Hj Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 that:

> The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside ex debito justitiae, that is to say, irrespective of the merits and without terms. However, the application to set aside such a judgment should be made: (i) with reasonable promptitude; and (ii) before the defendant has taken any fresh step after becoming aware of the irregularity (see O 2 r 2(i) of the Rules of the High Court 1980).

The fourth defendant came to know about this judgment from the search of the court docket on 6 February 1999, and within a month took out this application on 8 March 1999 to set aside the judgment.

It is also pertinent to note that the fourth defendant had filed this application on 8 March 1999, ahead of the plaintiff's application (filed on 31 May 1999) to amend the said judgment in default (which was later withdrawn).

It is clear that this application was filed with reasonable promptitude and is bona fide.

The most important consideration in an application to set aside a judgment in default is whether there is a defence on the merits. The question of delay is secondary (See *Malayan United Bank Bhd* 's case).

Good defence on the merits

The fourth defendant's affidavit of merit/proposed defence is substantially grounded on similar facts and issues as that of the first, second and third defendants' defences, the triability of which had already been adjudicated upon earlier by His Lordship Muhammad Kamil J, on 24 November 1998, where he dismissed the plaintiff's applications and held that the issues raised therein, in particular on the contractual requirement to review the banking facilities and on the alleged facts relating to estoppel, merited going to trial.

Learned counsel for the fourth defendant submitted that as both the plaintiff's earlier applications and this present application involved the same issues, thus he would rely substantially on the said judgment. The said issues had been adjudicated upon and held to be triable issues.

In reply, the learned counsel for the plaintiff submitted that the fourth defendant was not a party to the earlier applications to strike out the first defendant's defence and counterclaim and the second and third defendants' defences, therefore the plaintiff is not estopped by the earlier decision from responding to the issues raised by the fourth defendant in the present application. She cited a recently decided case by the Court of Appeal *Kong Wing Sum v Public Bank Bhd* [2000] 1 MLJ 570.

It is not disputed that in both the plaintiff's earlier applications (encls 50 and 61) and the present application, the defence involved the same issues.

I have the liberty to read the judgment of Muhammad Kamil J in respect of the plaintiff's earlier applications. I concur with His Lordship's finding on the said issue and I do not intend to deliberate any further on it.

I hereby allow the fourth defendant's application with costs to be taxed unless agreed.

Fourth defendant's application allowed with costs to be taxed.

Reported by Moy Saw Han